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## The Acceptance of Court Judgments

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*Document Version*

Publisher's PDF, also known as Version of record

*Publication date:*

2014

[Link to publication in University of Groningen/UMCG research database](#)

*Citation for published version (APA):*

Boekema, M. (2014). *The Acceptance of Court Judgments: The Influence of Procedural and Distributive Justice*. University of Groningen. Faculty of Law.  
[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2533856](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2533856)

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# **University of Groningen Faculty of Law**

## **The Acceptance of Court Judgments: The Influence of Procedural and Distributive Justice**

**by I.M. (Martje) Boekema**

**August 2014**

**University of Groningen Faculty of Law Research Paper Series  
No. 10/2015**

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## The acceptance of court judgments: the influence of procedural and distributive justice

### *Explaining a citizen's choice to appeal in administrative legal procedures*

I.M. Boekema, LL.M.<sup>1</sup>

August 14, 2014

#### **Introduction**

In a state under the rule of law, the government should be bound by legal norms as much as the citizen. This implies that if a citizen does not agree with a decision of a public authority that affects him or her personally, the citizen should be able to challenge this decision. In the Netherlands, a citizen who experiences a conflict with an administrative authority should first start an objection procedure against the decision.<sup>2</sup> The administrative body involved will then reconsider its decision. When the administrative body chooses to leave the decision intact, the citizen can apply for judicial review at a district court. During the procedure at the district court, the judge will evaluate the legality of the decision under scrutiny. After the judgment from the district court is delivered, the judgment can be appealed by the citizen and the administrative body involved.<sup>3</sup>

Litigants in administrative law cases appeal quite often – appeal rates are higher than in civil law cases and most criminal law cases. In state tax cases, alien law cases and public service law cases, one in every two judgments from the district court is appealed. Even the highest appeal rates in criminal law and civil law cases are typically lower than this figure. Judgments in commercial cases with an interest at stake above €25,000 are only appealed 22 percent of the time. The appeal rate for judgments in severe criminal law cases that are delivered by a three-judge division is a mere 38 percent.<sup>4</sup> An administrative law case typically involves two parties: a citizen and the administrative body concerned. Both parties can appeal the judgment from the district court but the high appeal rates in these cases are caused mainly by citizens. Research shows that they appeal about four times

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<sup>2</sup> Art. 7:1(1) in conjunction with 8:1 of the General Administrative Law Act or GALA. Yearly, more than a million notices of objection are lodged with administrative authorities. No exact figures are available, but the estimated yearly amount of notices is 2.6 million. L. van der Velden et al., *Prettig contact met de overheid 2*, Den Haag: Ministerie BZK 2010, 153.

<sup>3</sup> Appeals are filed both on questions of law and on facts. Appellate proceedings take place at one of the four administrative courts of appeal, with the Central Appellate Administrative Court and the Judicial Department of the Council of State handling the majority of all appeals. The procedures differ among the various fields of administrative law, with four courts of appeal involved: the Central Appellate Administrative Court (*Centrale Raad van Beroep*), the Judicial Department of the Council of State (*Afdeling Bestuursrechtspraak van de Raad van State*), the Administrative High Court for Trade and Industry (*College van Beroep voor het Bedrijfsleven*) and the five general Courts of Appeal (*gerechtshoven*). In addition to criminal and civil cases, the Courts of Appeal deal with appeals against tax assessments in their capacity as an administrative court. It should be noted that although in most fields of administrative law appeal is possible, in specific fields of administrative law a court of appeal functions as a court of first and last resort. Moreover, the court can opt for accelerated settlement if it manifestly lacks jurisdiction, if the application for judicial review is either manifestly unfounded or manifestly well-founded or if the party appellant is manifestly inadmissible. This means that no appeal is possible (article 8:54 (1) in conjunction with article 8:104 (2) GALA).

<sup>4</sup> Council for the judiciary, *Index numbers 2012*, The Hague: Council for the Judiciary 2013, 26-29.

more often than administrative bodies do.<sup>5</sup> While citizens appeal quite often in administrative law cases, their chances of success are relatively low. If an administrative body appeals, the success rate ranges from 55 percent to 70 percent. A citizen, however, will typically be successful only in one out of five cases.<sup>6</sup>

These figures make one wonder why relatively so many appeals are filed by citizens in administrative law. Why is a court judgment accepted by litigants less often than in other legal fields? Are citizens aware of the low success rate at the court of appeal? Or, perhaps, is there more to the decision to appeal than a cost-benefit analysis and are citizens mainly led by considerations of fairness? Unfortunately, there has been little research, both in the Netherlands and abroad, on the motives of citizens involved in legal procedures to appeal for review at an appellate court.<sup>7</sup>

To fill the aforementioned gap in the literature, this research investigates which factors influence the decision of an actor in an administrative process to appeal at a higher court if such an appeal is legally possible. More specifically, the research aims to investigate the role of economic versus normative considerations. Do citizens take into account the manner in which they were treated at the court of first instance? Do they reflect upon the fairness of the judgment they received? And, if this is the case, what is the relative role of normative concerns and economic considerations?

## **1. Theoretical background**

To understand the decision to appeal, some insight is needed in decision-making processes in general. We can distinguish between two perspectives on decision-making that are relevant in this context. The calculating citizen weighs the pros and cons of several options and then decides what course of action to take. The appraising citizen, on the other hand, takes decisions on the basis of his or her perceptions of justice. Both perspectives will be outlined below.

### **1.1 The calculating citizen**

When policymakers refer to the calculating citizen they often have a rational individual in mind, who is primarily concerned with his or her own interests. Often, the phrase has a negative connotation, for example where it refers to citizens with a 'not in my backyard' attitude. I will not use the term in this fashion. Rather, I use the phrase to refer to an individual who is intentionally pursuing certain

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<sup>5</sup> A.T. Marseille, 'De stormloop op het hoger beroep bij de centrale raad van beroep', *NJB* 2009, 1720-1721; A.T. Marseille, 'De dagelijkse praktijk van het hoger beroep bij de Afdeling bestuursrechtspraak', *NJB* 2003, 1065; E.C. Wilkinson et al., *Doorlooptijden asielpcedures vreemdelingenwet 2000*, Barneveld: Significat 2010, 328.

<sup>6</sup> Administrative bodies win 70% of all cases that they commence at the Central Appellate Appeals Tribunal and 55% of all cases instigated by them at the Administrative Jurisdiction Division of the Council of State: A.T. Marseille, K.J. de Graaf and A.J.H. Smit, *Ruimte voor rechtsvorming*, The Hague: BJU 2008, 164-165; A.T. Marseille, 'De stormloop op het hoger beroep bij de centrale raad van beroep', *NJB* 2009, 1721.

<sup>7</sup> A. M. Polinsky and S. Shavell, *Handbook of Law and Economics*, volume 1, Amsterdam: Elsevier, 386.

private goals and who is trying to make public authorities behave in ways that are favourable for these goals.<sup>8</sup>

My interpretation of the term 'calculating citizen' builds on rational choice theory. This theory states that individuals, when making choices, try to make choices that maximise expected utility.<sup>9</sup> This latter concept refers to the extent to which the options available to an individual result in the achievement of one or more of his or her goals. Rational choice theory assumes that an individual, when facing a decision, first considers all possible courses of action. These are determined by the position of an actor including his or her physical and economic constraints. According to the theory, an individual will then reflect on the probable outcomes of the different courses of action and decide which one to pursue, based on the utility of the different options.

In real-life decision-making situations, it is hard for an individual to estimate which outcome will follow a certain course of action. In other words, many situations are characterised by uncertainty. In case of the decision to appeal, an individual does not know if an appeal will be successful but the probability of success can be estimated. Rational choice theory tells us that a decision maker should take uncertainty into account by multiplying the utility of the outcome of each option to its probability.<sup>10</sup> This allows us to compare several possible actions in terms of their expected utility.<sup>11</sup>

If we apply rational choice theory to the decision to appeal, we can expect that citizens will appeal for review when the estimated chance of winning the appeals procedure multiplied by the benefits obtained by winning the procedure exceed the expected costs of the appeal.<sup>12</sup> Barendrecht and De Hoon distinguish four sets of costs that individuals have to bear when they start a judicial procedure: out of pocket expenses (such as filing fees and travel expenses), time, costs of delay and emotional costs.<sup>13</sup> The benefits of winning a judicial procedure are diverse. Winning a judicial procedure in most circumstances means that the administrative authority should take a new

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<sup>8</sup> Such an actor would be called a rational actor in economic literature. S. Bowles, *Microeconomics; Behavior, institutions and evolution*, New York: Sage 2004, 10.

<sup>9</sup> J. Coleman and T. Farraro, *Rational choice theory: Advocacy and Critique*, London: Sage 1992, xi. Rational choice theory can both be used as a descriptive and as a normative theory. I will use it as a descriptive theory.

<sup>10</sup> J. Baron, *Thinking and Deciding*, Cambridge: Cambridge University Press 2008, 233-234. Baron refers to this theory as utility theory. For the purpose of clarity, I will refer to rational choice theory throughout this text.

<sup>11</sup> J. Elster, *Rational Choice*, Oxford: Basil Blackwell 1986, 6. The expected utility of an action is defined as the weighted average of the utilities it will yield under different scenarios. The weights are the expected likelihood of these scenarios (EU =  $\sum \text{probability} * \text{outcome}$ ).

<sup>12</sup> In some procedures, benefits may be attached to postponing the moment a final decision is reached by a judge. For legal reasons, these benefits do not play an important role in administrative law. Cf. P.O. de Jong, *Beroep op tijd: een onderzoek naar het tijdsbeslag van beroepsprocedures in eerste aanleg in het bestuursrecht*, The Hague: BJu 2004, 52.

<sup>13</sup> J. M. Barendrecht and M. de Hoon (eds.), *Verbetering van hoger beroep?: kosten en baten van voorstellen uit twaalf systemen van procesrecht*, The Hague: BJu 2006, 16. Moreover, the calculation has to take into account the extra costs that an actor has to bear if he or she is ordered by the judge to bear the procedural costs of the other side when losing the case. However, this does not happen very frequently for citizens in administrative law. Moreover, if a citizen wins the procedure, the filing fees will be compensated by the administrative body (article 8: 74 (1) GALA). Moreover, if the citizen requests this, other costs made by the citizen (travel costs and legal expenses) will also be compensated for by the administrative body (article 8:75 (1) GALA). The rules for compensation of these costs are laid down in article 1 Besluit Proceskosten Bestuursrecht. Costs that can be compensated include the costs for an expert, witness or interpreter, legal fees, travel and accommodation expenses, expenses for excerpts from registers and for international telephone and fax communications, costs of delay and (in some cases) the costs of a physician acting as an attorney.

decision, which might be more favourable for the citizen. Moreover, winning a judicial procedure in itself might be favourable as it might repair reputational damage. In addition, for some citizens preventing the establishment of a leading case might be important.

Rational choice theory has been severely criticized from the 1950s onwards.<sup>14</sup> One line of critique states that individuals not only strive to fulfil their self-interest but also take into account their relationship to others. Modern microeconomic theory recognizes that actors, when choosing what course of action to take, are guided by social norms as well as by a cost-benefit analysis.<sup>15</sup> This critique links to the theories of distributive and procedural justice, which will be explored below.

### 1.2 The appraising citizen

The concepts of procedural and distributive justice provide an alternative perspective to understand why citizens may want to appeal for review: this choice might be based more on emotions than on the weighing of costs and benefits. According to this perspective, individuals are concerned with whether they are treated well as a member of society: individuals want to be treated with fairness and due respect.

Distributive justice refers to the distribution of benefits and burdens among individuals in society.<sup>16</sup> It states that when an individual is confronted with a decision by an authority (such as a judge) he or she will assess the fairness of that decision by referring to certain distributive rules.<sup>17</sup> There are several principles by which fairness can be judged, including merit, equality and need.<sup>18</sup> Individuals use these concepts separately or in combination when they evaluate the fairness of a decision that concerns them.

Distribution on the basis of merit has its roots in equity theory, as developed by Adams.<sup>19</sup> It stresses that differences in the distribution of benefits and burdens between individuals can be justified, as long as choices are based on certain values. The equitability of a decision can be assured in several ways: by assessing an individual's effort, actual contribution or talent. This is best explained by the example of a company that has to select one of its employees for a desirable management traineeship. The company could base its choice on the employees' past efforts, for

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<sup>14</sup> Due to this critique, it has today become commonly accepted that rationality is bounded in the sense that even if individuals can be rational, they sometimes are not. See for an overview D. Hardman, *Judgement and decision making; Psychological perspectives*, Chichester: Blackwell 2009, 5

<sup>15</sup> S. Bowles, *Microeconomics; Behavior, institutions and evolution*, New York: Sage 2004, p. 96-97.

<sup>16</sup> J. Konow, 'Is fairness in the eye of the beholder? An impartial spectator analysis of justice', *Social Choice and Welfare*, 33, no. 1 (2009): 101.

<sup>17</sup> M.T.A.B. Laemers et al., *Derde evaluatie van de algemene wet bestuursrecht; Awb-procedures vanuit het gezichtspunt van de burger*, Den Haag: BJU 2007, 22.

<sup>18</sup> T.J. Burleigh and D.V. Meegan, 'Keeping Up with the Joneses Affects Perceptions of Distributive Justice', *Social Justice Research* 2013-2, 120-131.

<sup>19</sup> J.S. Adams, 'Inequity in social exchange', *Advances in Experimental social psychology*, 1965, 267-299.

example the amount of hours they worked overtime. A second option would be to base the choice on the actual contribution of employees towards company goals. Thirdly, the company might wish to select an employee for the management traineeship on the basis of talent.<sup>20</sup>

The application of these three forms of equitability to a court judgment is not very straightforward, the exact interpretation will depend on the nature of the case and on the legal rules on which the judgment is based. For example, in many fields open norms are used by the legislator. These open norms might stipulate that a financial institution should ensure that a client is well informed about the risks of a financial product or that an employer should ensure safety for employees at the workspace. If legal subjects do not live up to these norms, a fine can be imposed by an administrative body. A judge will assess the effort these actors have made to obey the law to determine whether the imposition of the fine was justified.

The distribution of benefits on the basis of equality is more straightforward; this principle simply requires that individuals should be treated equally. However, the classical neoliberal principle of equality, which states that government should treat individuals equally, does not adequately describe the current state of affairs in a welfare state, such as the Netherlands. As the Dutch legislator has expressly stipulated in its Explanatory Memorandum to Article 1 of the Dutch constitution, the government can give preferential treatment to certain groups in society, as long as unequal treatment can be justified and has a legal basis.<sup>21</sup>

A citizen who is confronted with a court judgment may assess whether he or she is treated in line with the equality principle by referring to statutes, to case law and to a reference group. As all citizens are equal before the law, he or she can expect to be treated in accordance with the statutes. Moreover, citizens will assess whether they are treated in the same way as citizens in a comparable situation, as follows from the case law. Finally, citizens will judge whether they are treated in line with others in the same situation with regard to the narratives they learn from friends, relatives or acquaintances or from the media. For example, some Dutch municipalities require that citizens who receive social assistance benefits fulfil certain obligations. This can consist of employment as part of a Work First programme or of participation in a another programme stimulating entrance into the labour market. An unemployed person will, when judging whether it is fair that the municipality requests this of them, take into account whether all people in this situation have to fulfil these duties. If there are large differences in this respect, this might be difficult for citizens to accept.

Benefits can also be distributed on the basis of need. This distributive rule specifies that each individual should receive benefits according to his or her needs. In the above example about selecting an employee for a traineeship, the company might wish to select the employee most in

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<sup>20</sup> C. Sabbagh, 'A taxonomy of normative and empirically oriented theories of distributive justice', *Social Justice Research*, 2001, 252-254.

<sup>21</sup> Explanatory Memorandum to Article 1 of the Dutch constitution, Parliamentary Papers 1975-1976, 13 872, nr. 3, 25.

need of training. The principle of need is often applied in social legislation on, for example, minimum wages and unemployment benefits.<sup>22</sup> When a judge evaluates a decision by an administrative body, he or she will often not evaluate an individual's needs directly, but will use specific criteria that are reflected in specific legal rules. For example, some unemployment benefit cannot be granted if an individual has income from other sources, such as savings. The applicable acts will specify in detail under which circumstances an individual's needs justify the granting of benefits, such as unemployment benefits.

In this study, distributive fairness was measured by asking respondents to rate the court judgment with respect to the degree to which the judgement reflected their personal situation (need). Moreover, respondents were asked to rate the judgment with respect to the degree to which it was in line with legal rules (equality). Finally, respondents were asked to rate the judgment with an eye to whether they received what they thought they were entitled to (equity).

While distributive justice relates to the fairness of an outcome, the concept of procedural justice underlines the importance of the procedure that was followed to reach this outcome.<sup>23</sup> In the context of a court procedure, the concept emphasizes that citizens are sensitive to the way in which judicial decisions are reached.<sup>24</sup> Citizens who feel that the judge treated them fairly will often perceive the ensuing judgment to be fair as well. Evidence for this relationship has been found in several studies, including the famous 'paths to justice' study conducted by Genn and Paterson in Scotland.<sup>25</sup>

The first researchers to investigate procedural justice were Thibaut and Walker.<sup>26</sup> In one of their first experiments on this topic, undergraduate students participated in a criminal procedure in which they were assigned the roles of either the accused or the victim. During the hearing, five different procedures were followed, ranging from more inquisitorial to more adversarial. The students were asked to rate these procedures. From the results, it followed that all subjects perceived the adversarial procedure to be most fair, regardless of whether they won or lost the case. Thibaut and Walker ascribed these findings to the fact that this procedure gave participants more control over the decision making process.<sup>27</sup> Thibaut and Walker were thus the first to show that different procedures lead to different fairness judgments, irrespective of the outcome of the procedure.<sup>28</sup>

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<sup>22</sup> C. Sabbagh, 'A taxonomy of normative and empirically oriented theories of distributive justice', *Social Justice Research*, 2001, 252-254.

<sup>23</sup> M.T.A.B. Laemers et al., *Derde evaluatie van de algemene wet bestuursrecht; Awb-procedures vanuit het gezichtspunt van de burger*, Den Haag: BJU 2007, 22.

<sup>24</sup> T.R. Tyler, *Why people obey the law*, Princeton: Princeton UP 2006, p. 75. His ideas are built on Luhman's theory of *Legitimation durch Verfahren*. See for an analysis of this theory N. Huls, *Actie en Reactie*, Den Haag: BJU 2008, p. 251.

<sup>25</sup> This research focused on civil cases in Scotland. H. Genn and A. Paterson, *Paths to Justice Scotland*, Oxford: Hart 2001.

<sup>26</sup> J. van der Linden, *De civiele zitting centraal: informeren, afstemmen en schikken*, Deventer: Kluwer 2010, 21.

<sup>27</sup> J. Thibaut, L. Walker, S. LaTour and P. Houlden, 'Procedural justice as fairness', *Stanford Law Review* 1973, 1271-1289.

<sup>28</sup> E.A. Lind, T.R. Tyler and Y.J. Huo, 'Procedural Context and Culture: Variation in the Antecedents of Procedural Justice Judgments' *Journal of Personality and Social Psychology*, 1997, 767.



A classic research on the effects of procedural and distributive justice is Tyler's panel study conducted in Chicago in 1984. Tyler conducted two series of telephonic interviews with citizens who had recently contacted the police or the court. The study explored the relative influence of procedural and distributive justice on the satisfaction of citizens with a decision made by the police or the court.<sup>29</sup> The study found an independent influence of both distributive and procedural justice on the satisfaction of individuals with the outcome they received.<sup>30</sup> Similar conclusions have been reached in a range of studies, both laboratory studies and field experiments.<sup>31</sup>

While early researchers focus on the extent to which individuals feel that they can influence the decision making process (a concept called 'voice'), later researchers broaden the concept of procedural justice to include fairness in interpersonal relationships and good information provision.<sup>32</sup> In line with this broader notion of the term, I will distinguish five subaspects of procedural justice. These are the ability of the judge (is he or she skilled and well-prepared during the court session?), the impartiality of the judge (was he or she impartial and did he or she conceive the situation from the citizen's point of view?), voice (could the citizen defend his or her point of view?), information provision (was the court procedure clearly explained?) and respect (did the judge show respect for the citizen?). Together, these aspects measure whether an individual will perceive a procedure to be fair.

## **2. Data collection**

Data was collected in three fields of administrative law: social assistance benefits, tax law and construction law.<sup>33</sup> These three fields were chosen because they give a profile of public law court cases; the cases included in the sample involve various public bodies and a broad range of interested citizens. Moreover, this selection guarantees that the three largest courts of appeal in the Netherlands are included in the sample: the general courts of appeal, the Administrative Jurisdiction Division of the Council of State and the Central Appeals Tribunal.<sup>34</sup>

The research was carried out in cooperation with the Dutch Council for the Judiciary and four district courts. In the three legal fields chosen, the four district courts selected all judgments that were delivered in the last six months and in which an appeal had been possible. The address of the

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<sup>29</sup> T.R. Tyler, *Why people obey the law*, Princeton: Princeton UP 2006, 91-94.

<sup>30</sup> T.R. Tyler, *Why people obey the law*, Princeton: Princeton UP 2006, 92-97. See for similar findings T.R. Tyler, 'The role of perceived injustice in defendants' evaluations of their courtroom experience', *Law and Society Review* 1984-1, 51-74.

<sup>31</sup> For an overview, see T. R. Tyler, 'Procedural Justice', In: *Jury psychology: social aspects of trial processes*, Farnham: Ashgate 2009.

<sup>32</sup> J. van der Linden, *De civiele zitting centraal: informeren, afstemmen en schikken*, Deventer: Kluwer 2010, 21.

<sup>33</sup> To be specific, this included cases on the basis of the Work and Social Assistance Act, tax cases (both national taxes and local taxes) and cases involving a building permit and/ or an environmental permit. These permits are issued on the basis of the Environmental Permitting General Provisions Act.

<sup>34</sup> Cases at the Trade and Industry Appeals Tribunal were not investigated as this tribunal handles only a small fraction of all appeals in public law cases.

citizen involved was noted down and duplicate addresses were removed. The list of addresses was then sent to the Council for the Judiciary.

The citizens on this list received a letter from the Council for the Judiciary, which told them about the study and invited them to take part. Respondents could complete the questionnaire directly on the university website or they could fill in a form and ask the research team to call them on a specific time for a telephonic interview. Because each respondent had a unique ID, duplicate questionnaires were prevented. Those that did not want to participate were asked to send in some of their personal details to the Council for the Judiciary, which were later used to perform a non-response analysis. The survey contained both closed-ended and open-ended questions.

In total, 1422 letters were sent to respondents, generating 241 completed questionnaires. The response was therefore approximately 17%. Of these respondents, approximately two-third (163 persons) did not file an appeal while the remaining one-third of the respondents (78 persons) did appeal for review. These figures are in line with the overall appeal rate in administrative law.<sup>35</sup> The citizens who had appealed had not yet received a judgment from the court of appeal.<sup>36</sup> The majority of the respondents (98%) undertook litigation for themselves, for their family or for a one-man business. Only two percent of the respondents had litigated in court for a company or NGO. The response group included 47 state tax cases, 46 building law cases, 50 social benefits cases and 98 local tax cases. Although analyses per category were carried out, the results of the study described in this article follow from an analysis that includes all cases.

### **3. Results**

The below paragraph outlines the results of the study. I will first describe the answers that respondents gave to an open-ended question, asking for the most important reason why they choose (not) to appeal. In paragraph 3.1, the results of this question will be linked to the two perspectives, that of the appraising citizen and that of the calculating citizen. Then, in paragraph 3.2 the data available from the closed-ended questions will be used to investigate the relationship of procedural and distributive justice to the choice to appeal. Paragraph 3.3 investigates the role played by cost-benefit concerns in the decision to appeal, as follows from the responses to the closed-ended questions. Paragraph 3.4 investigates the relative influence played by justice concerns and cost-benefit concerns. Finally, paragraph 3.5 explores the expectations that citizens have of their chances of success at a higher court and compares these to the realised outcomes of a reference group.

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<sup>35</sup> Council for the judiciary, *Index numbers 2012*, The Hague: Council for the Judiciary 2013, 26-29.

<sup>36</sup> The questionnaire asked citizens whether a judgment had been delivered by the court of appeal. If this was the case, then they were automatically directed to another, similar, questionnaire. This outcome of the procedure for this group is shown in table 4.

### 3.1 Most important reason for (not) appealing

Both the respondents who had appealed and those who had not were asked to state their most important reason for doing so. The answers to this open question have been recoded into a limited number of categories and are shown in the two tables below.

**Table 1 Most important reason for appealing**

1	<i>Perspective of the calculating citizen</i> I expect a more favourable judgment from the court of appeal	37%
2	The personal consequences of the district court judgment are large	9%
3	I appeal as this has suspensive force with regard to the court judgment	1%
4	I have new arguments that I can present to the court of appeal	1%
5	<i>Perspective of the appraising citizen</i> I expect a better judge, who will take my case more seriously	33%
6	I expect a more understandable judgment from the court of appeal	16%
7	It's a matter of principle	3%
	Total	100%

N = 70, missing values = 8

From the table above, it follows that the arguments mentioned by respondents to appeal for review can be linked to the perspective of the calculating citizen as well as to the perspective of the appraising citizen. In effect, the two types of arguments are mentioned approximately with the same frequency. Another thing that meets the eye is that relatively few respondents appeal primarily on principle. Furthermore, it can be noted that a very small fraction of respondents appeals primarily for the sake of the suspensive force of the appeals procedure. This makes sense, as an appeals procedure in administrative law often does not have suspensive force.<sup>37</sup>

Moreover, we can see that new arguments were only mentioned by 1% of respondents to be the main reason for appealing for review. In a separate yes-or-no question, respondents were asked whether they appealed because they had new arguments and/or new evidence to present to the court of appeal. From the results, it appeared that 57% had new arguments that they could put forward at the court of appeal and 46% had new evidence that they could present at the court of appeal. It is surprising that a relatively large group files an appeal with there being no new evidence or new arguments to bring forward.

<sup>37</sup> Most appeals in Work and Social Assistance Act cases do have suspensive force as is stipulated by Article 9 of Annex 2 to the GALA.

**Table 2 Most important reason for not appealing**

1	The chance of a better outcome is fairly small	39%
2	I accept the court judgment	13%
3	I expect the costs to be too high	12%
4	The personal consequences of the court judgment are limited	11%
5	I expect that an appeal would take too long	5%
6	It wasn't possible as I made some mistake	5%
7	I didn't feel like having another legal procedure	5%
8	I expect that the other party and I can reach an understanding	3%
9	I'm trying to solve the conflict by means of another legal procedure	3%
10	I expect that it would give me too much stress	3%
11	It would probably lead to a less favourable judgment	1%
	Total	100%

N = 153, missing values = 10

From the table above, it follows that the reasons for not filing an appeal diverge widely. The reason mentioned most often by respondents is that they see an appeal as pointless, as the chances of success are fairly small. Other respondents focus on the costs of a court procedure, both in terms of financial costs as well as in terms of time consumed and the annoyance or stress that such a procedure entails. These costs (categories 3,5,7 and 10) are mentioned by 25% of the respondents as the primary reason for choosing not to appeal. More than one in every ten respondents stated that they did not appeal as they accepted the judgment of the court of first instance. This figure seems quite low but we should keep in mind that none of the respondents received a favourable outcome while the stakes in most court procedures are quite high. Some respondents stated that they would have liked to appeal, but that this was not possible anymore because of procedural reasons. This often had to do with the appeal period, which has a strict deadline.<sup>38</sup> For some reason, no appeal was filed within the appeal period, after which the respondent was told by officials that an appeal was not possible anymore. It should be noted that only a small fraction thinks that an appeal would lead to a more unfavourable judgment. This finding has to do with the nature of the cases chosen for the research: none of the respondents chosen for the study received a favourable judgment. Finally, we see that approximately one in ten respondents indicates that the personal consequences of the district court judgment were fairly small and that this was their most important reason for not filing an appeal.

<sup>38</sup> The appeal period is 6 weeks, as is stated by, Article 7, book 6 GALA.

### 3.2 Procedural and distributive justice

The questionnaire not only asked respondents directly about their reasons for appealing, it also contained nine closed-ended questions that measured perceived procedural justice and three closed-ended questions that measured distributive justice. From a reliability analysis, it followed that two scales could be constructed: one that measured distributive justice and one that measured procedural justice (see annex I). From the results of a Pearson rank correlation test involving these two variables, it appeared that respondents that perceived the procedure to be fairer also perceived the judgment to be fairer ( $r=0.74$ ,  $p<0.001$ ,  $n=221$ ). More than half (55%) of the variation in perceived distributive fairness could be attributed to perceived procedural fairness ( $r^2=0.39$ ). From a stepwise multivariate regression analysis, it follows that the influence of procedural justice is greater (bèta 0.56) than the influence of the degree of favourableness of the court procedure (bèta 0.41).<sup>39</sup>

These findings confirm the findings described above: individuals are not only concerned with the outcome of a decision-making process, but also with the procedure through which they received that outcome. It appears that in this case justice concerns are even more influential than the degree of favourableness of the outcome. These findings can perhaps be attributed to the fact that the process must have made a strong impression on the respondents. The majority of the respondents (90%) had been present at the court session and from the comments they made during the surveys, it appeared that most citizens had formed a clear opinion about the judge and the court procedure. Such strong procedural justice effects perhaps may not be found if there is no court session and the whole procedure is carried out on paper.

The findings of the study also show evidence for a direct relationship between distributive justice and the choice to appeal for review. From the results of an independent samples t-test, it follows that the score on the distributive justice scale is lower for those who appeal (mean 5.4, variance 2.0) than for those who do not appeal (mean 7.4, variance 2.7).<sup>40</sup> The difference is statistically significant at the 1% level.<sup>41</sup> Moreover, it was found that 18% of the variation in filing an appeal could be attributed to perceived distributive justice.<sup>42</sup> We can therefore conclude that the perceptions of a citizen about the fairness of a court judgment influence the decision whether or not to appeal for review.

<sup>39</sup> As it was difficult for the courts taking part in the study to select only cases in which the respondent had been unsuccessful at the court of first instance, respondents that had been successful also received an invitation. These respondents were later left out but for this single analysis they were used. The degree of favourableness of the judgment could be unfavourable, partially favourable or favourable (in the own words of the respondent). The regression analysis started with procedural justice, which had the highest correlation in a bivariate analysis. If the outcome of the procedure was added, the multiple correlation found was 0.82 ( $p<0.001$ ). This is an improvement from 0.74, but the smaller bèta shows that procedural justice has a greater impact on the perception of the judgment than the degree of favourableness of the judgment.

<sup>40</sup> The distributive justice scale constructed ranges from 3 to 15, the result of adding the outcomes of three questions with a Likert scale.

<sup>41</sup>  $T=5.8$ ,  $df=146.4$ ,  $p<0.001$  in a two-tailed test.

<sup>42</sup> Cohen's D was 0.94 and  $r$  was 0.43 which is fairly high.

The relationship between procedural justice and the choice to appeal for review was also tested by means of an independent samples t-test. From the results, it follows that those who appeal rate the fairness of the procedure lower (mean 25.2, variance 7.8) than those who do not appeal (mean 29.7, variance 7.0). The differences were statistically significant at the 1% level.<sup>43</sup> Moreover, it was found that 8% of the variance in filing an appeal could be explained by perceived procedural justice.<sup>44</sup> From these figures, it follows that perceived procedural justice influences an individual's decision to appeal for review. However, it should be noted that the influence is smaller than that of perceived distributive justice.

### *3.3 Cost-benefit considerations*

The decision to appeal will probably depend not only on normative concerns but also on a cost-benefit analysis. The interests at stake will be important in this respect, as well as the estimated costs of an appeal and the estimated chance of success. The interests at stake were measured by asking respondents whether they could put a price on the stakes. This was not always possible; in disputes between neighbours concerning building permits, for example, the interests at stake had to do with deteriorating living conditions. From the results of a Kendall's tau-c test for those respondents who could express the stakes in financial terms, it followed there was a weak positive relationship between the stakes of the case and the decision to appeal ( $\tau=0.2$ ,  $p<0.01$ ,  $n=162$ ). In other words, if the stakes in a given case were higher, respondents were more likely to appeal for review. The interests at stake explained 5% of the variance in appealing for review.<sup>45</sup>

An analysis was also carried out to test whether respondents were less likely to appeal when they estimated the costs of the appeal to be higher. Respondents were asked to estimate the costs of appeal; an independent samples t-test was used to test if there were significant differences between the group who appealed and the group who did not. Some differences were found: those who appealed estimated the costs of another legal procedure to be lower (mean €1,544.-, variance €4,219.-) than those who did not appeal (mean €2,135.-; variance €5,611.-). We see that the results indicate that respondents appeal less often when they estimate the costs of an appeal to be higher. However, this finding is not statistically significant,<sup>46</sup> probably due to the high variance in both groups. We saw from the answer to the open question that the costs of an appeal are the most important reason why citizens choose not to appeal. We can therefore conclude that, although no

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<sup>43</sup>  $T = 4.1$ ;  $df = 201$  and  $p<0.001$  in a two-tailed test.

<sup>44</sup> Cohen's  $D$  was 0.58 and  $r$  was 0.28.

<sup>45</sup> The financial stakes were measured by six categories, the lowest category being < 5000. Most respondents turned out to fall within the lowest category. A stronger relationship might have been found if the cases had been more evenly distributed across the categories.

<sup>46</sup>  $T=0.67$ ;  $df=158$ ;  $p>0.05$  in a one-tailed test.

statistically significant inferences can be drawn, the estimated costs nevertheless play a role in the decision to appeal.

Moreover, it was tested whether the estimated chance of success influences the decision to appeal. The estimated chance of success was measured on a five-point scale, ranging from 'very small chance' to 'very large chance'. The relationship between the estimated chance of success and the decision to appeal was measured by means of a Kendall's tau-c test. It appears that there is a relatively strong positive relationship between the estimated chance of success and the decision to appeal ( $\tau=0.44$ ,  $p < 0.01$ ,  $n=221$ ). We see from these figures that citizens who estimate the chance of success to be higher are more likely to file for appeal. The estimated chance of success explains 19% of the variation in filing an appeal.<sup>47</sup>

### *3.4 The relative importance of justice concerns and cost-benefit considerations*

Which of the variables mentioned so far has the greatest influence on the decision to appeal? To find the answer to this question, a multivariate analysis was carried out with the above variables. The interests at stake were left out of the analysis because of the large amount of cases in which no price could be put on the interests at stake. As the dependent variable was binary (appeal or no appeal), logistic regression was used. This is a non-linear statistical technique, that predicts a binary dependent variable from a set of independent variables.

As not all respondents answered all relevant questionnaire items, the analysis was carried out with 120 cases. From the results, it follows that only the estimated chance of success in the appeals procedure and perceived distributive justice are now statistically significant.<sup>48</sup> This is not surprising, as these were also the variables that had the strongest correlation with the decision to appeal in the binary analysis. From the logistic regression (see appendix II) it follows that the higher the estimated chance of success, the higher the odds that a citizen will appeal. Furthermore, we can see from the results that the higher perceived distributive justice, the lower the odds that a citizen will appeal. Moreover, it follows that the estimated chance of success influences the decision to appeal more than perceived distributive justice does. See Appendix II.

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<sup>47</sup> As the survey was taken after respondents had decided to file an appeal, these findings might reflect a justification after the event. We cannot be sure of a causal relationship but such a relationship seems plausible.

<sup>48</sup> The perceived chance of success was significant at the 1% level while perceived distributive justice was significant at the 5% level. The analysis was redone with all cases, with the neutral category or (in the case of the estimated costs of the appeal) the modus imputed for missing values. The outcome was then the same: only the perceived chance of success and distributive justice were statistically significant.

### 3.5 Chances of success: expectations and outcomes

The above analysis shows that the expected chance of success is the most important factor driving citizens to appeal a judgment from a lower court. An important question, therefore, is whether respondents in general have a good picture of their chances of success. The table below gives the estimations of success for those respondents who decided to appeal. As appears from the table, most respondents expect that their appeal will be upheld (i.e. the appeal is declared well-founded).

**Table 3 Estimated chances of success for those who appealed<sup>49</sup>**

	Taxes	Construction law	Social assistance benefits	Total
Expects appeal to be declared unfounded	11% (4)	18% (2)	14% (3)	13% (9)
Expects appeal to be upheld partially	37% (14)	18% (2)	19% (4)	29% (20)
Expects appeal to be upheld completely	53% (20)	64% (7)	67% (14)	59% (41)
Total	100% (38)	100% (11)	100% (21)	100% (70)

N=70, missing=8

As was pointed out in the introduction, in general only one-third of citizen's appeals will be declared well-founded by the court of appeal. If this number is compared to the estimated chances of success in table 3, it is striking how often citizens overestimate their chances of success. More evidence can be obtained from the results of a related study which targeted respondents who had recently completed an appeals procedure. While the respondents differed from those of the present study, the data collection method and period were the same.<sup>50</sup> The results of this survey among respondents who had recently received a judgment from a court of appeal are shown below. From these figures, it follows that in all legal areas the chances of success are overestimated.

<sup>49</sup> The estimated chance of success was measured on a five-point scale: very small chance, small chance, even odds, large chance, very large chance. For this analysis, the estimation was recoded to reflect the expected judgment, which enabled a comparison with the judgments obtained by respondents who had already received a decision from the court of appeal.

<sup>50</sup> In fact, both studies were linked. The questionnaire asked citizens whether a judgment had been delivered by the court of appeal. If this was the case, then they were automatically directed to another, similar, questionnaire. This study was carried out by professor A.T. Marseille and myself for the Dutch Council for the Judiciary. Respondents in both studies could choose between an online survey and a questionnaire that was conducted over the phone. The questionnaires were mostly the same, the type of cases were the same and the data were collected in the same period.



**Table 4 Realised outcome reference group**

	Taxes	Construction law	Social assistance benefits	Total
Appeal was declared unfounded	53% (10)	73% (38)	68% (43)	68% (91)
Appeal was upheld partially	16% (3)	12% (6)	22% (14)	17% (23)
Appeal was upheld completely	32% (6)	15% (8)	10% (6)	15% (20)
Total	100% (19)	100% (52)	100% (63)	100% (134)

N=134, missing =5

A Mann-Whitney U test was used to test if the differences between the two groups of respondents were statistically significant. In fiscal cases no significant differences could be found; this can be attributed to the small number of tax cases in the second group. A significant difference at the 1% level could be found for construction law cases and social assistance cases.<sup>51</sup> From the figures presented so far, we can infer that citizens filing an appeal in administrative law cases generally overestimate their chances of success. The major part of the citizens filing an appeal expect that their appeal will be upheld completely while in fact, only one-third of appellants at most receive this outcome at the court of appeal.

One may wonder why so many citizens filing an appeal overestimate their chances. Are these citizens perhaps not represented by a knowledgeable lawyer who can advise them? The questionnaire contained a question that asked respondents whether they had used professional legal assistance at the court of first instance. Within the group of appellants that had not yet received a judgment in appeal, 46% had received help while the remaining 54% had litigated without assistance. The figures are comparable for the group of appellants that had recently received a judgment from the higher court: 40% had received professional legal assistance at the court of appeal while 60% had not. It appears, therefore, that the majority of appellants is represented by a lawyer.

We could assume that if a lawyer were present, this would lead to a more realistic expectation of the odds of the case at the court of appeal. A Mann-Whitney U test was applied to the appellants that had not yet received a judgment from the court of appeal. From the results, it followed that those respondents that did not have legal assistance estimated the chance of success to be a little lower (mean rank 34.5) than those respondents that did have legal assistance (mean rank = 36.7). These small differences were not statistically significant ( $Z = -0.49$ ,  $p > 0.05$  in a one-sided

<sup>51</sup> To perform the analysis, the data for the expected chance of success and the realised success rate were compared. This presented no difficulties as the categories for the items were very similar, but the assumption had to be made that the expected chance of success can be restated to reflect the realized outcome of the case. In construction law cases, the expected chance of success is higher (mean rank 47.5) than the realised success rate in appeal (mean rank 28.7). This difference is statistically significant ( $Z = 3.606$ ,  $p < 0.001$ ). In social assistance benefits cases, the expected chance of success is also higher (mean rank = 63.6) than the realised success rate (mean rank = 35.47). This difference is statistically significant as well ( $Z = 5.077$ ,  $p < 0.001$ ).

test). We therefore see that the employment of a professional legal advisor, such as a barrister, does not seem to influence a citizens estimation of the odds of the case at the court of appeal.

#### **4. Conclusion**

The introduction to this paper stated that the appeal rate in administrative law cases is higher than the appeal rate in civil law and criminal law cases. This high appeal rate can be attributed to citizens, who appeal more often than administrative bodies. Administrative bodies seem to appeal more selectively: if they appeal, their chances of success are higher than if a citizen appeals. This makes one wonder whether citizens have a fair idea of their chances of success. From the results of this study, it follows that this is often not the case. Most appellants expect that their appeal will be declared well-founded while in reality only approximately one-third of them will receive this outcome at the court of appeal. Surprisingly, the presence of a lawyer does not lead to a different estimation of the chances of success.

This low success rate at the court of appeal may be related to the fact that many appellants do not bring any new evidence or new arguments forward. From the results, it appeared that 43% of appellants have no new arguments and 54% have no new evidence to present to the court of appeal. These figures indicate that citizens file an appeal even if there is a relatively low chance of success.

If citizens could be encouraged to accept the judgment from the court of first instance more often in cases with a low chance of success, this would have several beneficial consequences. First of all, courts of appeal could direct their energy to more complicated cases. This offers the court more opportunities to develop the law if legal terms are unclear, if the legislator has left a gap or if lower courts have come to diverging opinions. Moreover, an appeal might lead to stress and anxiety for citizens involved and can entail considerable costs. Citizens might wish to reconsider incurring these costs if they had a more realistic notion of the chances of success of their case.

This research focuses on several factors that can assist in encouraging citizens to accept a court judgment. The logistic regression analysis shows that the two most important factors influencing the acceptance of court decisions are distributive justice and the estimated chance of success of an appeal. The expected chance of success has the highest influence on the odds that a citizen appeals with perceived distributive justice slightly less important. Procedural justice was found to significantly influence the decision to appeal in a bivariate analysis. Moreover, procedural justice indirectly influences the decision to appeal as it affects distributive justice.

In the Netherlands, courts have recently initiated projects aimed at increasing the quality of the primary processes and the quality of the judgment itself. From the findings of this research one might expect that such projects could lead to a higher acceptance of court decisions. These effects

are particularly likely to take place if these projects lead citizens to have a more realistic estimate of their chances of success in an appeals procedure or if citizens are led to perceive the court procedure and the judgment of the district court to be more fair.

In conclusion, the results of this study show that the choice to appeal for review cannot be explained by a cost-benefit analysis only; the perspective of the calculating citizen gives no complete picture of the acceptance of court decisions. The perspective of the appraising citizen, who is concerned with distributive and procedural justice, is also needed to explain the decision to appeal for review.

## Appendix I reliability analysis

### Distributive justice

Respondents were asked to indicate how satisfied they were about several aspects of the judgment (see figure 1). The answers were given on a scale that ranged from 1 (very dissatisfied) to 5 (very satisfied).

**Figure 1 Questionnaire items distributive fairness**

How satisfied are you with:

1. The extent to which the judgment takes into account your personal situation?
2. The degree to which the judgment is in keeping with the legal rules?
3. The degree to which you received that what is due to you?

It is common to add the responses on the three items, which leads to a scale that ranges from 3 to 15.<sup>52</sup> This is only possible if the three items reflect the same underlying construct. It is possible to determine if this is the case by calculating the Cronbach's alpha for the items. This figure can vary from 0 to 1 and is the most common measure of scale reliability. From the results of a reliability analysis, it followed that the Cronbach's Alpha for the scale was 0.81. This indicates that the overall reliability of the scale is good. Moreover, it turned out that the Cronbach's Alpha could not be significantly improved by deleting an item. Finally, none of the corrected item-total correlations were lower than 0.35, which is the threshold below which items may have to be dropped.<sup>53</sup> See table 5 below. The table leads to the conclusion that all items in the scale are positively contributing to overall reliability.

**Table 5 Reliability analysis distributive justice**

	Corrected item-total correlation	Cronbach's alpha if item deleted
Item 1	0.68	0.72
Item 2	0.57	0.84
Item 3	0.75	0.66

N=197, missing = 44

<sup>52</sup> I calculated such a scale for the bivariate analysis involving either distributive or procedural justice and the choice to appeal. For the logistic regression, I calculated the mean score on procedural and distributive justice (a continuous variable with 1 as the minimum and 5 as the maximum) as this made the calculations easier.

<sup>53</sup> A. Field, *Discovering statistics using IBM SPSS Statistics*, London: Sage 2013, p. 713.

*Procedural justice*

The questionnaire also asked respondents to indicate how satisfied they were about several aspects of the procedure (see table 1). The answers were given on a scale that ranged from 1 (very dissatisfied) to 5 (very satisfied).

**Figure 2 Questionnaire items procedural justice**

How satisfied are you with:	
1.	The extent to which the court gave parties the possibility to relate their story?
2.	The preparation of the judge with regard to your case?
3.	The degree to which the judge listened to your point of view?
4.	The degree to which the judge conceived the situation from your point of view?
5.	The expertise of the judge?
6.	The impartiality of the judge?
7.	The degree to which the court procedure was clearly explained?
8.	The degree to which the court treated you with respect?
9.	The degree to which all relevant information was discussed?

If the responses on the nine items are added, this leads to a scale that ranges from 9 to 45. The Cronbach's Alpha for the scale is 0,91, which indicates that the overall reliability of the scale is good. Moreover, it turns out that the Cronbach's Alpha could not be significantly improved by deleting an item and the corrected item-total correlations were fairly high. See table 6 below. The table leads to the conclusion that all items in the scale are positively contributing to the overall reliability and the scale can therefore be constructed.

**Table 6 Reliability analysis procedural justice**

	Corrected item-total correlation	Cronbach's alpha if item deleted
Item 1	0.71	0.90
Item 2	0.70	0.90
Item 3	0.77	0.89
Item 4	0.76	0.89
Item 5	0.65	0.90
Item 6	0.71	0.90
Item 7	0.62	0.90
Item 8	0.63	0.90
Item 9	0.66	0.90

N=204, missing = 37

**Appendix II Logistic regression**

Table 7 contains the results of a logistic regression analysis with the decision to appeal as the dependent variable.

**Table 7 Results logistic regression**

Variables <sup>54</sup>	Regression coefficient <sup>55</sup>	Standard error	Odds ratio <sup>56</sup>	Wald	Degrees of freedom	p-value
Distributive justice	-1.039	0.351	0.354	5.247	1	0.022
Procedural justice	-0.290	0.613	0.749	0.683	1	0.409
Degree to which judgment puts citizen in the right	0.805	0.000	0.189	1.723	1	0.189
Estimated costs of appeal	0.000	0.453	0.288	1.131	1	0.288
Estimated chances in appeals procedure	0.672	0.218	1.958	9.517	1	0.002
Constant	-0.308	1.552	0.735	0.040	1	0.842

N=120, missing =121

Odds ratios higher than one indicate a positive relationship while those lower than one indicate a negative relationship. An odds ratio of one denotes that two variables are unrelated. From the figure above, it appears that all variables bear a negative relationship to the choice to appeal except for the estimated chances in the appeals procedure. Moreover, it follows that only two variables show a significant relationship with the choice to appeal: the estimated chance of success and distributive justice.<sup>57</sup>

From the figure above, the relative influence of these variables can be calculated. This was done by calculating the outcome of the regression formula, using the regression coefficients, with the value of all variables set on the mean except for the concerning variable.<sup>58</sup> From the results, it follows that if a citizen scores one unit higher on the distributive justice scale, the chance of an appeal is lowered by 38%. In contrast, if a citizen scores one unit higher on the item measuring estimated chance of success, the chance that he or she will appeal is raised by 73%. It appears, therefore, that the estimated chance of success influences the decision to appeal more than the perceived distributive justice.

<sup>54</sup> Nagelkerke's  $R^2$  for the model as a whole is 0,386, which means that the fit of the model with the data is fairly high. The  $R^2$  for distributive justice is 0.052 while  $R^2$  for the expected chance of success is 0.097. These figures have been found by calculating Nagelkerke's  $R^2$  for the whole model, then calculating it again with distributive justice and the estimated chance of success respectively left out. The difference in  $R^2$  gives a measure of how much the degree to which the model fits the data improves if the variable is included. It appears that the expected chance of success contributes more to the fit of the model to the data than distributive justice does.

<sup>55</sup> The chance that a person will appeal  $P(Y)$  is predicted by the following equation:  $1 / 1 + e^{-(\text{constant} + b_1 \cdot X_1 + b_2 \cdot X_2 \text{ etcetera})}$ .

<sup>56</sup> The 95% confidence interval for the odds ratio for the estimated chance of success ranges from .245 to 1.418 and therefore includes one. This means that the results should be regarded with caution. However, because the positive relationship between the estimated chance of success and the decision to appeal is in line with the results of the bivariate analysis described earlier, it seems likely that there is a relationship between the two variables.

<sup>57</sup> Perceived distributive justice is significant at the 5% level, while estimated chance of success is significant at the 1% level.

<sup>58</sup> The sample means are: distributive justice 2.30; procedural justice 3.10; degree to which the judgment puts citizen in the right: 1.32; estimated costs of appeal: €2155.25, estimated chance in the appeals procedure: 2.75.